BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MELODY WHITE	)	
Claimant	)	
VS.	)	
	)	Docket No. 175,602
BOEING MILITARY AIRPLANES	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY CO.	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant requested review of the Award entered by Administrative Law Judge John D. Clark dated January 16, 1996. The Appeals Board heard oral argument on May 16, 1996.

APPEARANCES

Claimant appeared by her attorney, James A. Cline of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Chris J. McCurdy of Wichita, Kansas.

RECORDS & STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 3.5 percent functional impairment rating. Claimant requested this review and asks the Appeals Board to review the Judge's finding of nature and extent of disability. Claimant contends she has established her right to an award for work disability. Respondent contends claimant sustained a back injury in December 1992, approximately three months after her alleged work-related accident on September 29, 1992, and that claimant's functional impairment is the result of that later accident. Therefore, respondent contends claimant's claim for compensation should be denied.

Nature and extent of disability is the sole issue on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

The Administrative Law Judge found that claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent on September 29, 1992. The parties have not requested review of that finding and it is, therefore, adopted by the Appeals Board.

As part of her treatment, claimant consulted orthopedic surgeon Paul D. Lesko, M.D., who saw her on two occasions, November 13, 1992 and December 17, 1992. He diagnosed a mild low back strain and believed claimant's injury involved the lumbar facets. When he last saw claimant he believed she had a 2 percent whole body functional impairment and should be restricted to limited bending and twisting. When asked if he felt claimant had fibromyalgia, Dr. Lesko stated that was not an appropriate diagnosis considering his findings.

On December 21, 1992, claimant began seeing Pedro A. Murati, M.D., who diagnosed myofascial pain syndrome aggravated by claimant's work. Dr. Murati's office notes dated January 5, 1993, indicate claimant re-injured her back lifting chairs during the Christmas holidays. Dr. Murati testified the nonwork-related chair-lifting incident has contributed to claimant's injuries and impairment, but he is unable to quantify the extent. He was not asked to determine a functional impairment rating for claimant when he was treating her and, due to the passage of time, he is unable to determine her impairment now. However, Dr. Murati does believe that claimant had permanent impairment when he last saw her. Based upon a functional capacity evaluation he requested in January 1993, the doctor believes claimant could perform work in the light/medium labor category because she has the ability to lift 30 pounds occasionally and 15 pounds frequently. Although he testified the Christmas incident contributed to claimant's condition, he was not asked to separate claimant's restrictions between her work-related and nonwork-related accidents.

Claimant also treated with orthopedic surgeon Michael P. Estivo, M.D., who saw claimant on three occasions between May and August of 1993. Claimant was referred to Dr. Estivo by the attorney who represented her at that time. Dr. Estivo prescribed medications and recommended physical therapy and an MRI. Based upon his evaluation and treatment, he believes claimant sustained a soft tissue injury to her low back. Because claimant discontinued with Dr. Estivo before his recommended treatment was complete,

he did not determine whether claimant had sustained permanent impairment or needed permanent restrictions.

At her attorney's request, claimant was also evaluated by Ernest R. Schlachter, M.D., in January 1994. Dr. Schlachter diagnosed a chronic lumbosacral sprain. His findings did not indicate fibromyalgia. He was not provided a history of the Christmas 1992 injury and was not asked to apportion his impairment rating and restrictions between the work- and nonwork-related accidents. After learning that the 1993 MRI results were initially erroneous and the results had been corrected to indicate the MRI did not show a herniated lumbar disc, Dr. Schlachter lowered his functional impairment rating from 8 percent to 5 percent and modified his opinion of claimant's work restrictions. Dr. Schlachter's final restrictions were to limit claimant from lifting over 45 pounds in a single lift and over 35 pounds repetitively.

Claimant is no longer employed by the respondent. She testified she was placed on medical leave. There is no evidence that respondent has offered to return claimant to work in an accommodated position.

Based upon the entire record, the Appeals Board finds that the claimant sustained a low back injury in September 1992 while working for the respondent. At the time of her accident, claimant's job duties included pushing a heavy cart and filling various machines with oil. Claimant's job was physically demanding and required her to lift up to 50-60 pounds and repetitively kneel, bend and stoop.

Based upon Dr. Murati's uncontroverted testimony, the Appeals Board finds that claimant sustained additional injury during the Christmas 1992 holidays that has contributed to her permanent impairment and disability. Because Dr. Lesko is the only physician to have evaluated claimant before the subsequent December 1992 accident, the Appeals Board finds his testimony the most persuasive and that claimant has sustained a 2 percent whole body functional impairment as a result of her September 29, 1992 work-related accident. Also, the Appeals Board finds that claimant should observe, according to Dr. Lesko, the restrictions of limited bending and twisting.

Because hers is an "unscheduled injury," claimant's right to permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e, which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Based upon the entire record, the Appeals Board finds that claimant's ability to earn comparable wages has been reduced by approximately 18 percent as a result of her September 1992 accident. The Appeals Board finds claimant retains the post-injury ability to earn approximately $600 per week as indicated by the statistics and information

presented by respondent's vocational rehabilitation witness, Maurice L. Entwistle. This conclusion regarding wage loss takes into consideration claimant's education which includes an undergraduate degree in communications and some hours towards a master's degree.

The Appeals Board finds that claimant has failed to prove her loss of ability to perform work in the open labor market. Neither the respondent's witness, Maurice L. Entwistle, nor claimant's witness, Jerry D. Hardin, were asked to provide their opinion of loss of ability to perform work in the open labor market utilizing the restrictions of Dr. Lesko. Mr. Hardin provided his opinion of loss of access considering Dr. Schlachter's initial restrictions, which were later modified, and those of Dr. Murati. Likewise, Mr. Entwistle's final opinion of loss of access to the open labor market of 4 percent was based upon Dr. Schlachter's final restrictions. Therefore, the opinions provided by both Entwistle and Hardin were based upon claimant's impairment and restrictions that included the injury sustained in the December 1992 nonwork-related incident. Because of the minimal impairment sustained by claimant and the minimal restrictions given her by Dr. Lesko, coupled with the lack of other evidence establishing the percentage of loss of ability to perform work in the open labor market due solely to the September 1992 accident, the Appeals Board finds this loss should be considered as zero percent for purposes of computing permanent partial general disability.

Based upon the evidence presented and pursuant to K.S.A. 1992 Supp. 44-510e, the Appeals Board finds claimant has established a 9 percent permanent partial general disability which is an average of the 18 percent loss in ability to earn a comparable wage and the zero percent loss in ability to perform work in the open labor market.

Respondent contends claimant should be limited to benefits based upon functional impairment only under the rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), where claimant refused to return to work at a comparable wage when offered an accommodated position by her employer. The Foulk decision is not applicable to the facts of this case. First, the evidence is lacking that respondent offered claimant a position she could perform without violating her permanent work restrictions and limitations. Claimant's September 1992 accident prevented her from performing the job she held on the date of accident and it appears claimant would need accommodation to return to respondent's employ. Second, claimant's college degree that she obtained in 1987 would not return her, at this time, to a wage comparable to that which she was earning on the date of accident. Claimant has not worked in a job related to her communications degree after 1988 when she left a Denver television station. In that job she earned $7.00 per hour. Should claimant return to a job in the communications field at this time, Mr. Hardin testified she would not be able to earn a comparable wage. Therefore, claimant's failure to apply for jobs in her college major does not act to invoke the rationale of the Foulk decision.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark, dated January 16, 1996, should be, and hereby is, modified to award claimant benefits based upon a 9 percent permanent partial general disability.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Melody White, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Co., for an accidental injury which occurred September 29, 1992, and based upon an average weekly wage of $733.22 for 37 weeks of temporary total disability compensation at the rate of $299.00 per week or $11,063.00, followed by 378 weeks at the rate of $44.00 per week or $16,632.00 for a 9% permanent partial general disability, making a total award of $27,695.00.

As of June 1, 1996, there is due and owing claimant 37 weeks of temporary total disability compensation at the rate of $299.00 per week or $11,063.00, followed by 154.57 weeks of permanent partial disability compensation at the rate of $44.00 per week in the sum of $6,801.08, for a total of $17,864.08 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $9,830.92 is to be paid for 223.43 weeks at the rate of $44.00 per week, until fully paid or further order of the Director.

The remaining orders of the Administrative Law Judge are adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James A. Cline, Wichita, Kansas
Frederick L. Haag, Wichita, Kansas
Michael D. Streit, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director